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No. 101299

In the
# Supreme Court of the United States

JOSEPHINE S. MILLER,
*Petitioner,*

v.

PRAXAIR, INC., ET AL.,
*Respondents.*

*On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit*

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

To establish constructive discharge under Title VII, is a plaintiff required to show that the employer had the intent to cause the plaintiff to resign?

## PARTIES TO THE PROCEEDING

The Petitioner is Josephine S. Miller. The four Respondents are Praxair, Inc., John Day, David Chaifetz, and Dennis Reilly.

Miller was the plaintiff in the district court, and Respondents were the defendants. In the court of appeals, Miller was the appellant and Respondents were appellees.

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## PETITION FOR A WRIT OF CERTIORARI

Josephine Miller respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

## OPINIONS BELOW

The decision of the court of appeals is not reported and is available at 2010 U.S. App. LEXIS 24222. Pet. App. 1a–7a. The decision of the U.S. District Court for the District of Connecticut is not reported and is available at 2009 U.S. Dist. LEXIS 51130. Pet. App. 8a–35a.

## JURISDICTION

The court of appeals issued its judgment on November 24, 2010. Pet. App. 1a. On February 2, 2011, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including April 25, 2011. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

The following two provisions of Title VII of the Civil Rights Act of 1964 are involved here:

> It shall be an unlawful employment practice for an employer . . . to . . . discharge any individual, or otherwise to discriminate against any individual with respect to . . . compensation, terms, conditions, or privileges of employment,

> because of such individual's race, color, religion, sex, or national origin . . . .

42 U.S.C. § 2000e-2(a)(1).

> It shall be an unlawful employment practice for an employer to discriminate against any . . . employees . . . because [an employee] has opposed any practice made an unlawful employment practice by this title . . . .

*Id.* § 2000e-3(a).

## STATEMENT OF THE CASE

This case raises a basic question regarding the doctrine of constructive discharge on which the circuits are fully divided. "Most circuits do not require actual intent to compel the employee to quit, but in a few circuits evidence of the employer's intent is necessary." 8 Larson, *Employment Discrimination* § 127.06[1] (Matthew Bender 2010). Because the Second Circuit falls into this latter group, it rejected Josephine Miller's constructive-discharge claim.

### A. Miller becomes Managing Attorney after 10 years at Praxair.

Miller began her career with the National Labor Relations Board as a Field Attorney in 1980, spending the decade obtaining expertise in labor law. Praxair, Inc., then offered her a position as in-house counsel. Praxair (formerly known as Union Carbide Industrial Gases, Inc.) is a global Fortune 300 company with 26,000 employees that supplies gases, coatings, and related services for a variety of industries.

Miller accepted the position and over the next 10 years developed a stellar track record within Praxair. By the year 2000, she had been named Managing Attorney for the Legal Department. She was responsible for labor and employment litigation at Praxair, and in this capacity she reported to Chief Labor Counsel John Day. Miller also handled general-liability litigation defense; for these matters she reported to Richard Tisch. As Managing Attorney, Miller oversaw 16 staff members, and her duties included managing the preparation of the annual department budget. For issues relating to the overall operation of the legal department, she reported to General Counsel David Chaifetz (as did Day and Tisch).

Supervisors viewed her with great esteem. As Day wrote after Miller had spent 10 years at Praxair, he "professionally and personally" held Miller "in the highest regard." JA 144.[1]

### B. Supervisors who praised Miller become hostile as she vocalizes concerns of discrimination at Praxair.

Though things overall were going well for Miller and Praxair, Miller began seeing disturbing patterns in which Praxair officials were treating black and female employees worse than others. Miller, also a black female, began to speak out about these concerns.

That is when things changed.

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[1] "JA" refers to Volume 3 of the Joint Appendix filed in the court of appeals and is cited for direct quotes.

Praxair officials who had praised Miller became hostile. Even Day told her to "stop thinking like a minority" when Miller expressed concern that another black employee was unfairly targeted for layoff for refusing to commit fraud. JA 107. Day also began a new favorite saying around Miller when Praxair discharged black, male employees: "We just shot another black male," he would quip. JA 89–90. And when Praxair instituted an initiative to retain black males at higher levels within the company, Day sent an e-mail to various recipients, including Miller, attaching an article critical of civil-rights leaders for focusing on past injustices. Despite these conditions, Miller continued to perform her job at her standard high level.

On October 29, 2000, Miller met with Praxair CEO Dennis Reilly to express her concerns, including that another black female—a recently hired human-resources manager—was being targeted for termination after she complained that Praxair's hiring practices were discriminatory. Miller also spoke up about other supervisors' deliberate efforts to thwart the initiative to retain more black men at high-level positions.

Chaifetz learned of Miller's conversation with Reilly, and apparently was not pleased with Miller vocalizing her concerns. At a department meeting occurring about one week later, Chaifetz proposed that general-liability work be outsourced—cutting about 40% of Miller's work. This was particularly odd because Praxair had previously rejected this idea. Nonetheless, Chaifetz ordered his staff to further research the possibility of eliminating much of her work.

Again, Miller continued to perform her job with her usual diligence. Chaifetz had requested, for example, that she propose changes to Praxair's severance plan, and she soon provided him with such a proposal that would benefit Praxair. Oddly, Day reprimanded her for communicating directly with Chaifetz. He stated: "[Y]ou need to clearly understand—and accept—several expectations I have, none of which were met here . . . ." JA 108. He then instructed her that he must "review in advance any policy proposals" before she communicates them to someone else. *Id.* Day had never made such a restriction before Miller met with CEO Reilly to relay her concerns about Praxair's discriminatory conduct, and this sort of restriction on communication was unheard of for someone at her high level in the legal department. Miller responded with an e-mail noting that this restriction was inappropriate. Chaifetz—who had requested the memorandum from Miller—was copied on these communications but did not respond.

As Miller worked through 2002 and continued to vocalize her concerns, Day's hostility worsened. Managers in Praxair's Oakland office had been accused of engaging in unfair labor practices in response to certain employees' effort to unionize. Miller was responsible for writing Praxair's position letter to the NLRB regarding the accusations. After she submitted the letter, Miller learned that a human-resources representative at Praxair had given her false statements to rely on in the letter. Miller—who had previously seen a management witness change testimony, drawing rebuke from an NLRB Judge—asked for an investigation into these wrongdoings and to take appropriate action to correct these misstatements to a tribunal, as required under the

rules of professional conduct. But Day refused. Instead, he became angry that Miller refused to defend Praxair's position, and he threatened that he would report her to the President of the company's largest division. Never before had anyone at Praxair similarly rejected Miller's advice regarding NLRB matters, as she was hired for her expertise in labor law.

Day's targeting of Miller then culminated in May 2002, when he re-wrote her performance evaluation to add criticisms to it. Day's conduct later became subject to an internal investigation at Praxair, conducted independently by the law firm of Holland & Knight. The firm concluded that these "performance appraisal revisions were inexplicable and were clearly flawed." JA 270.

Through two years of these conditions, Miller remained on the job. And, in the summer of 2002, she soon found herself in another position where she was pressured to take an unlawful stance as company counsel—this time at the hands of Chaifetz. Chaifetz told Miller to terminate one of the employees who reported to her, if that employee filed a workers' compensation claim. Chaifetz said he was under Reilly's orders to "take care of [that] disgruntled employee." Miller protested these orders as unethical and unlawful.

### C. After two years of hostility against her, Miller finally resigns.

This was the last straw. In August 2002, Miller gave notice that she was resigning. The Associate General Counsel asked if there was anything Praxair could do to get her to stay. And four days before

Miller's departure, the vice-president of human resources offered Miller the opportunity to speak with the CEO or General Counsel in an exit interview. Miller, of course, had been relaying her concerns all along, to no avail. She declined these offers, and her resignation became effective September 13, 2002.

Holland & Knight's investigation later noted that Day's interaction with Miller "appear[ed] to be a major reason for her departure from Praxair." JA 270. The firm also concluded that Day's "failure to insist on an investigation of her [discrimination] claims was extremely poor judgment." *Id.*

### D. The district court rejects her claim, noting that the defendants did not have the intent to cause her to resign.

After obtaining a right-to-sue letter from the EEOC, Miller filed suit in the U.S. District Court for the District of Connecticut against Praxair, Day, Chaifetz, and Reilly. Her complaint principally raised claims for (1) constructive discharge in violation of Connecticut law and Title VII, and (2) unlawful retaliation and harassment on account of her race, gender, and protected activity in violation of Connecticut law, Title VII, and 42 U.S.C. § 1981. The district court, which had federal-question jurisdiction under 28 U.S.C. § 1331, granted summary judgment to the defendants. Pet. App. 9a.

The court stated that constructive discharge occurs when "'the employer, rather than acting directly, deliberately makes an employee's working conditions so intolerable that the employee is forced into an involuntary resignation.'" *Id.* at 21a (citing *Pena v.*

*Brattleboro Retreat*, 702 F.3d 322, 325 (2d Cir. 1983)). The court further noted that this issue is typically not appropriate for summary judgment because the issue should generally be left to the trier of fact. *Id.* at 22a.

Nonetheless, the district court rejected Miller's claim as a matter of law. Consistent with Second Circuit precedent, the court explained that she failed to provide evidence that any of the defendants took action "with the intent that she resign." *Id.* at 24a. The court also believed that she offered "only her own speculation" that the conditions she faced were intolerable. *Id.*

### E. The court of appeals affirms for the same reason.

The Second Circuit, having jurisdiction to consider the district court's final order under 28 U.S.C. § 1291, affirmed. It took a similar approach regarding the constructive-discharge claim, requiring that Miller show that the defendants intended that she resign. Thus, the court believed, her claim was doomed because the defendants asked her to remain at Praxair: "[A]fter she tendered her resignation, defendants made *repeated* attempts to convince her to stay, and, accordingly, no rational trier of fact could conclude that a reasonable person in her position would have felt that her employer deliberately sought to make her working conditions so intolerable that she had no choice but to resign." Pet. App. 5a (court's emphasis). The court also stated its view that the conditions she faced largely amount to the sort of "routine disagreements" or "mild criticisms" that are insufficient to state a claim. *Id.* at 4a.

Miller now petitions for a writ of certiorari.

## REASONS FOR GRANTING THE PETITION

As one treatise explains, "[t]here is a split among the circuits on the question of what standard should be applied to determine whether there has been a constructive discharge." Larson, *supra*, § 127.06[1]. "Most circuits do not require actual intent to compel the employee to quit, but in a few circuits evidence of the employer's intent is necessary." *Id.*

This split remains even though this Court's decision in *Pennsylvania State Police v. Suders*, 542 U.S. 129 (2004), has been read to mean that "the intent requirement is probably no longer good law." Larson, *supra*, § 127.06[1]; *see also* Demi Sophocleous, *Sexual Harassment Test: Still Murky Despite Suders*, N.Y.L.J., at 2 (Sept. 19, 2007) ("[A]s recent lower court cases have established, the *Suders* decision has been unsuccessful in eliminating the continuing circuit split with respect to the appropriate test for determining the existence of a constructive discharge."). To show constructive discharge under *Suders*, a plaintiff "must show working conditions so intolerable that a reasonable person would have felt compelled to resign." *Suders*, 542 U.S. at 147.

This case—which involves the Second Circuit's particularly restrictive approach—presents the opportunity for this Court to resolve the split and provide clarity on the basic requirements for constructive-discharge claims. Certiorari should be granted.

## I. The Circuits are Divided Whether a Plaintiff Alleging Constructive Discharge Must Prove that the Employer Had the Intent to Cause the Plaintiff to Resign.

This section provides a brief chronology leading to the present-day circuit conflict regarding constructive discharge. As shown, the doctrine itself became firmly established decades ago, but the circuits divided through the 1980s and 1990s on whether an employee invoking the doctrine was required to show that the employer intended the employee to resign. This Court's *Suders* decision in 2004 suggested that there was no such requirement, but the full split in the circuits continues to this day.

### A. Constructive discharge becomes established doctrine.

The constructive-discharge doctrine originated in labor-law cases in the 1930s. *Suders*, 542 U.S. at 141. The NLRB developed the doctrine in response to employers who coerced employees to resign, often by creating intolerable working conditions, in retaliation for employees' engaging in collective activities. *Id.* In this context, the NLRB required employees to establish that the employer intended to cause conditions so unpleasant to force the employee to resign. *Id.* at 152–53 (Thomas, J., dissenting). Over the next two decades, circuit courts sustained NLRB constructive-discharge rulings. *Id.* at 141. The doctrine was thus firmly established by 1964, when Title VII was enacted. *Id.* Title VII, of course, prohibits discrimination in employment based on race, color, national origin, gender, or religion. 42 U.S.C. § 2000e-2. It also prohibits retaliation

against individuals who oppose these unlawful practices. *Id.* § 2000e-3.

The circuits recognized constructive-discharge claims in a wide range of Title VII cases. *Suders*, 542 U.S. at 142 (citing various circuit decisions employing the doctrine, including in cases of race and gender discrimination). But they would handle these claims in conflicting ways.

### B. The circuits develop a full split regarding employer intent.

The division in the circuits materialized in the 1980s. As the Tenth Circuit explained, "There is . . . a divergence of opinion among the circuits as to the findings necessary to apply the doctrine." *Derr v. Gulf Oil Corp.*, 796 F.3d 340, 343 (10th Cir. 1986). "While some courts require the employee to prove the employer's specific intent to force him to leave, . . . others have adopted a less stringent objective standard requiring the employee to prove that the employer has made working conditions so difficult that a reasonable person in the employee's shoes would feel forced to resign." *Id.* (contrasting *Bristow v. Daily Press, Inc.*, 770 F.2d 1241, 1255 (4th Cir. 1985), with *Goss v. Exxon Office Sys. Co.*, 747 F.2d 885, 887–88 (3d Cir. 1984)).

The split developed fully across the circuits through the 1990s. As one commenter explained in a 2002 article, "Most circuits, including the First, Third, Fifth, Seventh, Eighth, Ninth, Tenth, and Eleventh, do not require the plaintiff to show [that] the employer specifically intended to force her to quit." Cathy Shuck, Comment, *That's it, I Quit: Returning to First*

*Principles in Constructive Discharge Doctrine*, 23 Berkeley J. Emp. & Lab. L. 401, 413 (2002) (citations below).[2] A "minority of circuits," however, still purported "to require that the plaintiff show that the employer subjectively intended to force [the plaintiff] to quit." *Id.* at 415. In particular, "courts in the Second and Fourth Circuits must be satisfied that the specific intent element has been met . . . ." *Id.* at 416.[3]

Though the Second and Fourth Circuits were often singled out as the strictest in this regard, the Sixth and Eighth Circuits also issued decisions purporting to require this showing of employer intent. *See, e.g.*, *Logan v. Denny's*, 259 F.3d 558, 568–69 (6th Cir. 2001)

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[2] *Ramos v Davis & Geck*, 167 F.3d 727, 732 (1st Cir. 1999); *Goss*, 747 F.2d at 888; *Bourque v. Powell Elec Mfg. Co.*, 617 F 2d 61, 64 (5th Cir 1980); *Lindale v. Tokheim Corp.*, 145 F 3d 953, 955 (7th Cir. 1998); *Hukkanen v. Int'l Union of Oper'g Eng'rs*, 3 F.3d 281, 284–85 (8th Cir. 1993); *Nolan v. Cleland*, 686 F.2d 806, 813–14 (9th Cir. 1982); *Derr*, 796 F 3d at 343–44; *Steele v. Offshore Shipbuilding Inc* , 867 F.3d 1311, 1317 (11th Cir. 1989); *see also Clark v. Marsh*, 665 F.2d 1168, 1175 n 8 (D.C. Cir. 1981).

[3] *See, e g.*, *Pena*, 702 F.2d at 325 ("A constructive discharge occurs when the employer, rather than acting directly, deliberately makes an employee's working conditions so intolerable that the employee is forced into an involuntary resignation."), *EEOC v. Clay Printing Co.*, 955 F 2d 936, 944 (4th Cir. 1992) ("Deliberateness [for constructive discharge] exists only if the actions complained of 'were intended by the employer as an effort to force the employee to quit.'" (quoting *Bristow*, 770 F.2d at 1255)); *Victory v. Hewlett-Packard Co* , 34 F. Supp. 809, 826 (E.D N.Y. 1999) ("Not only is it necessary to show intolerable working conditions, but the plaintiff must also allege facts sufficient to prove that these conditions were intentionally created by the employer for the purpose of inducing the employee's resignation or retirement ").

(holding that constructive-discharge plaintiff must show that employer had "the intention of forcing the employee to quit"); *Tatom v. Georgia-Pacific Corp.*, 228 F.3d 926, 932 (8th Cir. 2000) (overturning jury verdict for constructive discharge because the plaintiff "presented no evidence that it was [the employer's] intention to force his resignation").

For these circuits requiring employer intent, evidence that the employer encouraged the plaintiff to remain employed was devastating to the claim. *See Whidbee v. Garzarelli Food Specialties, Inc.*, 223 F.3d 62, 74 (2d Cir. 2000) (rejecting constructive-discharge claims where the employer "demonstrated an interest in retaining the plaintiffs"); *Tatom*, 228 F.3d at 932 (overturning jury verdict where the evidence showed that the employer "valued [the plaintiff] as an employee"); *Pena*, 702 F.2d at 326 ("No reasonable person would have found this a compulsion to resign, particularly when members of the administration were asking [the plaintiff] to stay on as a general supervisor . . . ."); *see also Skare v. Extendicare Health Serv.*, 431 F. Supp. 2d 969, 977 (D. Minn. 2006) (rejecting constructive-discharge claim because employer made effort to convince plaintiff to stay at the company).

### C. This Court's 2004 decision in *Suders* suggests that there is no intent requirement.

Recognizing that a conflict in the circuits regarding the constructive-discharge doctrine presents an important federal question, this Court granted certiorari in *Suders* to resolve a different aspect of the doctrine: Whether constructive discharge due to

supervisor harassment is a tangible employment action and therefore creates strict liability for the employer. *Suders*, 542 U.S. at 140. The Court held that the employer is strictly liable only when the constructive discharge is the result of official acts of the entity. *Id.* at 148.

The *Suders* Court's definition of constructive-discharge claims also suggested an answer to the split regarding employer intent—that the employee need not establish that the employer intended the employee to resign. The Court focused on an objective standard involving a reasonable employee's reaction to the conduct: The employee "must show working conditions so intolerable that a reasonable person would have felt compelled to resign." *Id.* at 147; *see also id.* at 148 ("A constructive discharge involves both an employee's decision to leave and precipitating conduct . . . ."). In dissent, Justice Thomas contended that the Court's definition of constructive discharge was inconsistent with the earlier NLRB decisions, which required a showing that the employer intended that the employee resign. *Id.* at 153 (Thomas, J., dissenting).

### D. The split remains to this day as circuits have persisted in the intent requirement.

Despite *Suders*' suggestions that there is no employer-intent requirement for constructive-discharge claims, some circuits (including the Second) continue to hold otherwise. 3 Larson, *Labor and Employment Law* § 59.05[8] n.74 (Matthew Bender 2010) ("Despite *Suders'* language on this point, some courts have continued to apply their pre-existing tests . . . .").

The Fourth Circuit, for example, recently acknowledged that its "requirement that the plaintiff prove the employer intended to force the plaintiff to quit is arguably in some tension with the Supreme Court's decision in . . . *Suders* . . . ." *Whitten v. Fred's, Inc.*, 601 F.3d 231, 248 n.8 (4th Cir. 2010). Yet, because post-*Suders* decisions in that circuit continued to apply the intent requirement, "circuit precedent . . . prevent[ed] [the court] from considering [the] assertion that deliberateness is no longer an element of a constructive discharge claim." *Id.*

Similarly, the Second Circuit has acknowledged arguments that *Suders* eliminates the intent requirement. *E.g.*, *Nugent v. St. Lukes-Roosevelt Hosp. Ctr.*, 303 F. App'x 943, 945 (2d Cir. 2008) ("[E]ven if [the plaintiff] is correct that the Supreme Court has removed the intent element of the constructive discharge standard, [she] introduced insufficient evidence to survive summary judgment."). But it, too, has persisted with the intent requirement. *See, e.g.*, *Theilig v. United Tech Corp.*, No. 10-1417, 2011 U.S. App. LEXIS 6074, at *6 (2d Cir. Mar. 24, 2011) (stating that constructive discharge occurs when an employer "intentionally creates an intolerable work atmosphere that forces an employee to quit involuntarily" (quoting *Chertkova v. Conn. Gen. Life Ins. Co.*, 92 F.3d 81, 89 (2d Cir. 1996))); *see also Morris v. Schroder Capital Mgmt. Int'l*, 481 F.3d 86, 88 (2d Cir. 2007) (relying on Second Circuit's 1983 *Pena* decision to define constructive discharge and making no reference to *Suders*); *see also Cecil v. United States Postal Serv.*, No. 03-8404, 2004 U.S. Dist. LEXIS, at *4 (S.D.N.Y. Aug. 24, 2004) (citing *Suders* and Second Circuit decisions for the proposition that a plaintiff claiming constructive discharge must establish that

"the employer deliberately imposed intolerable working conditions in order to force the employee to retire").

The Sixth and Eighth Circuits have also stated, post-*Suders*, that the employer-intent requirement remains. *See Lisdahl v. Mayo Found.*, 633 F.3d 712, 2011 U.S. App. LEXIS 3808, at *12–13 (8th Cir. Feb. 28, 2011) (rejecting the argument that *Suders* "limited any Eighth Circuit cases requiring an intent-to-force-out in order to prove constructive discharge" under the Uniformed Services Employment and Reemployment Act of 1994 and concluding that "an intent requirement is implicit in the *Suders* test"); *West v. Tyson Foods*, 374 Fed. App'x 624, 640 (6th Cir. 2010) ("To determine if there is a constructive discharge, both the employer's intent and the employee's objective feelings must be examined." (quoting *Logan*, 259 F.3d at 569)); *see also Mitchell v. Univ. Med. Ctr., Inc.*, No. 07-414, 2010 U.S. Dist. LEXIS 80194, at *21 n.9 (W.D. Ky. Aug. 9, 2010) (noting that constructive discharge requires showing that employer intended to force employee to quit).

Consistent with their pre-*Suders* practice, courts within these circuits still reject constructive-discharge claims outright if the evidence shows that the employer tried to keep the employee from resigning. *See, e.g.*, *id.* (rejecting plaintiff's claim because of evidence that employer "wanted her to stay"); *Tardd v. Brookhaven Nat'l Lab.*, No. 04-3262, 2007 U.S. Dist. LEXIS 34378, at *14 (E.D.N.Y. May 8, 2007) ("In light of [the employee's] own testimony that [his employer] was working to keep him as an employee and that he was treated well by his new supervisor, the Court holds as a matter of law that no rational trier of fact

could infer that the defendants were deliberately creating an intolerable working environment.").

Of course, those circuits on the other side of the split (having no such intent requirement) remained there after *Suders*, leaving the full split intact. *E.g.*, *Poland v. Chertoff*, 494 F.3d 1174, 1185 n.7 (9th Cir. 2007) ("Unlike some of our sister circuits, we do not require that, in addition to proving that working conditions were intolerable, a plaintiff must establish that his employer created the intolerable conditions with the intent to cause the employee to resign."); *see also Narotzky v. Natrona Cnty. Mem. Hosp. Bd. of Trs.*, 610 F.3d 558, 565 (10th Cir. 2010) ("We apply 'an objective test under which neither [the plaintiff's] subjective views of the situation, nor [the employer's] subjective intent are relevant.'" (quoting *Tran v. Trs. of State Colls. in Colo.*, 355 F.3d 1263, 1270 (10th Cir. 2004) (alterations deleted))). A sampling of decisions issued within the last year from these circuits shows their continued adherence to this objective standard, further illustrating the deep split—and recurrence of this issue—to this day.[4]

## II. The Intent Requirement Is Contrary to this Court's Precedent and Is Illogical.

For two basic reasons, this Court should jettison the minority view that adheres to the intent requirement.

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[4] *E.g.*, *Noack v YMCA*, No. 10-20312, 2011 U.S App LEXIS 5452, at *12 (5th Cir. Mar. 16, 2011), *Roman v. Potter*, 604 F.3d 34, 42 (1st Cir. 2010); *Thompson v. Mem'l Hosp. of Carbondale*, 625 F.3d 394, 401–02 (7th Cir. 2010); *Matias v. Sears Home Improvement Prods*, 391 F. App'x 782, 788 (11th Cir. 2010)

First, as suggested earlier, the requirement is contrary to this Court's decision in *Suders*. The Court's definition of constructive discharge was objective and involved no requirement that the plaintiff show that the employer intended to force the employee to resign: The employee "must show working conditions so intolerable that a reasonable person would have felt compelled to resign." *Id.* at 147. The Court reached this definition even though the possibility of such an intent requirement was raised at the oral argument. Tr. of Oral Argument at 6–7, *Suders*, No. 03-95 (Mar. 31, 2004) (counsel for employer argues, consistent with "some courts," that there must be "some proof of an intention on the part of the employer . . . to get rid of the employee"). Moreover, the Court's implication that there is no intent requirement prompted Justice Thomas to dissent. *Id.* at 153 (Thomas, J., dissenting); *see also* 3 *Labor and Employment Law* § 59.05[8] ("While not directly holding that intent is not required, [*Suders*] statements about what was required to show constructive discharge suggest that the employer does not have to intend the employee to resign or even foresee it."). Indeed, the Fourth Circuit has acknowledged that its approach may be contrary to *Suders*, but has explained that it is now bound by its own precedent. *Whitten*, 601 F.3d at 248 n.8.

Second, the intent requirement is illogical and creates absurd results. An employer could create a horrendous environment for the employee yet avoid liability by simply making efforts to keep the employee on the job. But what if a supervisor *enjoys* abusing the employee? That supervisor would not intend to have the employee resign. That scenario arose in the Eighth Circuit's *Hukkanen* decision. There, a

supervisor touched an employee's breasts, groped between her legs, and even brandished a gun while threatening to rape her. 3 F.3d at 285. When she quit, the supervisor asked her to stay. *Id.* at 284. On appeal, the employer argued that she could not establish constructive discharge because the supervisor did not harass her with the intent of having her quit—to the contrary, he wanted her to stay so he could continue to harass her. *Id.* The Eighth Circuit properly rejected that approach: "Our language [in earlier cases] does not mean constructive discharge plaintiffs must prove their employers consciously meant to force them to quit." *Id.*; *but see, e.g.*, *Tatom*, 228 F.3d at 932 (requiring that showing).

This intent requirement is fundamentally flawed and should be eliminated.

## III. This Case Presents the Appropriate Vehicle to Resolve the Question.

As noted, the Second Circuit shares distinction with the Fourth as being the strictest adherents to the employer-intent requirement. As one district court within the Second Circuit explains, "[t]he law of constructive discharge in the Second Circuit is clearly unfavorable to the plaintiff." *Bright v. Le Moyne Coll.*, 306 F. Supp. 2d 244, 256 (N.D.N.Y. 2004); *see also* John A. Berandbaum, *Reconstructing Constructive Discharge in Second Circuit,* N.Y.L.J., at 1 (June 6, 2008) ("The already-harsh constructive discharge doctrine is made harsher by the law of . . . the Second Circuit."). And, as noted, the Second Circuit has not adjusted its approach in light of *Suders*: "To date, . . . courts within [the Second Circuit] have either ignored *Suders'* formulation of constructive discharge or, in the

absence of a contrary Second Circuit ruling, held that the decision has no impact on the employer intent requirement." Berandbaum, *supra*, at 5.

Here, that strict approach caused the lower courts to reject Josephine Miller's well-supported claim of constructive discharge. The district court explained that the defendants did not act against her "with the intent that she resign." Pet. App. 24a. The Second Circuit put even more weight on this point, explaining that the defendants "made *repeated* attempts to convince her to stay . . . ." Pet. App. 5a (court's emphasis). "[A]ccordingly," the Second Circuit concluded, "no rational trier of fact could conclude that a reasonable person in her position would have felt that her employer deliberately sought to make her working conditions so intolerable that she had no choice but to resign." *Id.* Because the Second Circuit held that Miller could not establish the intent requirement, there was no way Miller could succeed on her claim. This explains why the Second Circuit issued a summary order to affirm the district court's decision and provided only a cursory review of whether the working conditions themselves were indeed intolerable. Without discussing the facts, the court dismissed these conditions as involving nothing more than "routine disagreements" or "mild criticisms." *Id.* at 4a.

But a brief look at some of the conditions Miller faced shows that any reasonable person would have felt compelled to resign. Miller had a stellar record and glowing approvals over 10 years as she attained the Managing Attorney position at Praxair. But, as she vocalized concerns about the disturbing patterns of disparate treatment of other black employees, she

suddenly became a target. Supervisors now scolded her for thinking "like a minority" and made sure she knew their pleasure when black employees were discharged—in John Day's words, when Praxair "shot another black male." Day even re-wrote Miller's performance evaluation—conduct that an independent review deemed "inexplicable and clearly flawed." And Chaifetz proposed outsourcing about 40% of her work—even though Praxair had rejected that idea before.

Despite this, Miller remained on the job—but she also remained a target. She was even pressured not to correct false information on a submission to the NLRB. Doing so, of course, violates ethical rules for attorneys, subjecting Miller to being disbarred. *See, e.g.*, Connecticut Rules of Professional Conduct, Rule 4.1 (2007) (stating general rule that a lawyer must disclose a material fact when disclosure is necessary to avoid assisting a fraudulent act by a client). Miller was also instructed to fire an employee if that employee filed a workers' compensation claim—which would subject Miller to violating anti-retaliation laws. When supervisors force an employee—especially an attorney—to commit such improper acts, *any* reasonable person in that attorney's shoes would resign. *Cf.* American Bar Association's Model Rules of Professional Conduct, Rule 1.16(a) (2010) (noting that a lawyer shall withdraw from representing a client if the representation will result in violation of the rules of professional conduct or other law).

Under the proper standard—that is, without the emphasis on whether Praxair actually intended that she resign—Miller's claims would be resolved in the way that even the district court acknowledged is

typically proper: "Since the standard for constructive discharge requires an evaluation of how a reasonable employee would behave in that employee's shoes, the issue should generally be left to the trier of fact." Pet. App. 22a (internal quotation marks omitted).

The Second Circuit's strict approach and emphasis on the evidence that Praxair attempted to keep Miller employed presents this Court with the opportunity to finally resolve the deep circuit split regarding the employer-intent requirement.

## IV. This Is an Important Federal Question.

Constructive discharge is a basic, recurring claim in the federal courts. And it is not simply a Title VII issue; courts assessing constructive-discharge claims under various statutes—including state courts considering state statutes—look to Title VII law for guidance. *Burlington Indus. v. Ellerth*, 524 U.S. 742, 755 (1998) (noting that many state-court "determinations of employer liability under state law rely in large part on federal court decisions under Title VII"). A search for the phrase "constructive discharge" among all district courts in the last five years reveals more than 2,700 decisions—more than one decision per day. Yet some circuits (including the Second) are imposing a requirement on plaintiffs not shared by other courts in the nation. This Court should ensure that the law for constructive-discharge claims is uniform—especially where the requirement imposed has no basis in this Court's precedent.

## CONCLUSION

The petition for a writ of certiorari should be granted.

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APRIL 2011

# APPENDIX

# APPENDIX

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## APPENDIX A

## UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

**No. 09-2962-cv**

**[Filed November 24, 2010]**

JOSEPHINE S. MILLER,
*Plaintiff-Appellant*,

-v.-

PRAXAIR, INC., DENNIS REILLY, DAVID CHAIFETZ, and JOHN DAY,
*Defendants-Appellees*.[1]

## SUMMARY ORDER

**RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN**

[1] The Clerk of Court is hereby directed to correct the caption to read as above.

**ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.**

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 24th day of November, two thousand ten.

PRESENT:

AMALYA L. KEARSE,
JOSEPH M. McLAUGHLIN,
DEBRA ANN LIVINGSTON,
*Circuit Judges*,

JOSEPHINE S. MILLER, Danbury, Connecticut, *pro se*.

LORI B. ALEXANDER (Theresa M. Waugh, *on the brief*), Littler Mendelson, P.C., New Haven, Connecticut, for *Defendants-Appellees*.

Appeal from the United States District Court for the District of Connecticut (Christopher F. Droney, *Judge*).

UPON DUE CONSIDERATION, it is hereby ORDERED, ADJUDGED, AND DECREED that the district court's June 18, 2009 Order granting summary judgment in favor of defendants-appellees is AFFIRMED.

Plaintiff-appellant Josephine S. Miller appeals from the district court's grant of summary judgment in favor of defendants-appellees Praxair, Inc. ("Praxair"), Dennis Reilly, David Chaifetz, and John Day (collectively, "defendants"), on all of her claims, which stem from her one-time employment by, and ultimate resignation from, Praxair. Principally, Miller's complaint alleges that defendants unlawfully retaliated against and harassed her on account of her race, gender, and protected activity, ultimately "constructive[ly] discharg[ing]" her by creating working conditions so intolerable that she was left with no choice but to resign. After the close of discovery, the district court found that no issues of material fact remained in dispute and that defendants were entitled to judgment as a matter of law on each of Miller's claims. Miller contends those findings were in error. We presume the parties' familiarity with the underlying facts, the procedural history, and the issues on appeal.

We review a grant of summary judgment *de novo*, and in so doing, we construe the evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in that party's favor. *See Okin v. Vill. of Cornwall-on-Hudson Police Dep't*, 577 F.3d 415, 427 (2d Cir. 2009); *Russo v. City of Bridgeport*, 479 F.3d 196, 203 (2d Cir. 2007). Summary judgment is warranted only where "there is no genuine issue as to any material fact and . . . the movant is entitled to judgment as a matter of law." Fed. R Civ. P. 56(c); *see Cordiano v. Metacon Gun Club, Inc.*, 575 F.3d 199, 204 (2d Cir. 2009).

As noted, Miller's complaint principally raises claims for constructive discharge in violation of

Connecticut law and Title VII of the Civil Rights Act of 1964, *see* 42 U.S.C. § 2000e *et seq.*, and unlawful retaliation and harassment on account of her race, gender, and protected activity in violation of Connecticut law, Title VII, and section 1981 of the Civil Rights Act of 1871, *see* 42 U.S.C. § 1981. With respect to Miller's constructive discharge claims, the standard is the same under state and federal law: to establish a claim, a plaintiff must show that the employer "intentionally creates a work atmosphere so intolerable that [the employee] is forced to quit involuntarily." *Terry v. Ashcroft*, 336 F.3d 128, 151-52 (2d Cir. 2003). "The inquiry is objective: Did [the] working conditions become so intolerable that a reasonable person in the employee's position would have felt compelled to resign?" *Penn. St. Police v. Suders*, 542 U.S. 129, 141 (2004). And as our case law makes clear, the standard is a demanding one, because "a constructive discharge cannot be proven merely by evidence that an employee . . . preferred not to continue working for that employer" or that "the employee's working conditions were difficult or unpleasant." *Spence v. Maryland Cas. Co.*, 995 F.2d 1147, 1156 (2d Cir. 1993).

Here, the district court concluded that the conditions described by Miller, even viewed in the light most favorable to her, were insufficient to meet that standard. *De novo* review of the record confirms the soundness of that conclusion. The conditions alleged by plaintiff largely amount to the sort of routine disagreements with supervisors or mild criticisms that are simply insufficient to establish the sort of "intolerable" working conditions necessary to a constructive discharge claim. *See, e.g.*, *Pena v. Brattleboro Retreat*, 702 F.2d 322, 325-26 (1983)

(disagreements with assigned duties and "business judgments" of employer "cannot even remotely be described as intolerable"). Moreover, we note that Miller concedes that, after she tendered her resignation, defendants made *repeated* attempts to convince her to stay, and, accordingly, no rational trier of fact could conclude that a reasonable person in her position would have felt that her employer deliberately sought to make her working conditions so intolerable that she had no choice but to resign.

Alternatively, the complaint alleges that defendants unlawfully retaliated against and harassed her on account of her race or gender by (1) taking retaliatory "adverse employment actions" against her, and (2) creating a "hostile work environment for her." The district court concluded that Miller's claims failed because the evidence she proffered, even viewed in the light most favorable to her, were insufficient to establish either an adverse employment action or a hostile work environment. We agree with those conclusions.

As we have previously explained, an "adverse employment action" is "more disruptive than a mere. . . alteration of job responsibilities." *Galabya v. N.Y.C. Bd. of Educ.*, 202 F.3d 636, 640 (2d Cir. 2000). Instead, typical examples of actionable adverse employment actions include "termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, [or] significantly diminished material responsibilities." *Id.* Here, aside from Miller's *voluntary* resignation, she identifies no adverse employment action taken against her. To the contrary, the complaint alleges that Miller was *promoted* during the relevant period and was

implored by defendants to stay when she announced her intention to resign. As such, she cannot establish a claim for unlawful retaliation on this basis.

A "hostile work environment" exists where the evidence shows "misconduct . . . severe or pervasive enough to create an objectively hostile or abusive work environment" and which the "victim . . . also subjectively perceive[s] . . . to be abusive." *Feingold v. New York*, 366 F.3d 138, 150 (2d Cir. 2004) (internal quotation marks omitted). Among the factors courts consider are "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with [the] employee's work performance." *Harris v. Forklift Sys.*, 510 U.S. 17, 23 (1993).

Here, as the district court correctly concluded, Miller offers no evidence which, even if credited, could satisfy that bar. Miller's strongest assertion – that on several occasions defendant John Day referred to the termination of African American employees by saying we just "shot"a "black male" – is insufficient even if credited because for a hostile work environment to exist, the offending "incidents must be more than episodic; they must be sufficiently continuous and concerted in order to be deemed pervasive." *Alfano v. Costello*, 294 F.3d 365, 374 (2d Cir. 2002) (internal quotation marks omitted); *cf. Feingold*, 366 F.3d at 150 ("[A] single act can create a hostile work environment if it in fact works a transformation of the plaintiff's workplace." (internal quotation marks, alterations omitted)). Here, Miller does not adduce any evidence that those isolated statements – or any of defendants' other conduct – were anywhere near significant

enough to "work[] a transformation" of her workplace. Accordingly, she cannot establish a claim on this basis, either.

Finally, Miller contends that the district court erred in granting summary judgment with respect to her remaining state law claims, and specifically, on her claim for wrongful discharge in violation of public policy. However, for the reasons set forth above, Miller is unable to establish that she was "discharged," and, accordingly, this claim also fails.

Thus, we detect no error in the district court's grant of summary judgment in favor of defendants on all of Miller's claims. To the extent Miller raises other arguments with respect to the Order entered below, we have considered them and reject them as meritless. Finally, because of our disposition of these issues, we deny as moot defendants' pending motion to dismiss the appeal.

Accordingly, for the foregoing reasons, the judgment of the district court is AFFIRMED.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

## APPENDIX B

**UNITED STATES DISTRICT COURT**
**DISTRICT OF CONNECTICUT**

**3:05-cv-402 (CFD)**

**[Filed June 18, 2009]**

| | |
|---|---|
| JOSEPHINE SMALLS MILLER<br>Plaintiff | ) |
| v. | ) |
| PRAXAIR, INC., DENNIS REILLY, DAVID CHAIFETZ, JOHN DAY<br>Defendants. | ) |

**RULING ON MOTIONS FOR SUMMARY JUDGMENT**

The plaintiff, Josephine Miller,[1] brought this action against her former employer, Praxair, Inc. ("Praxair"), and three Praxair employees: Chief Executive Officer Dennis Reilly, General Counsel David Chaifetz, and Chief Human Resources Counsel John Day. Praxair is a manufacturer of industrial and specialty gases headquartered in Danbury, Connecticut. Plaintiff alleges against Praxair the following: constructive

[1] The plaintiff, an attorney, is representing herself.

discharge in violation of Connecticut General Statutes Sec. 31-51q; the Connecticut Fair Employment Practices Act ("CFEPA"); Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e *et seq.*; the public policy of the State of Connecticut and the United States of America; an implied contract and covenant of good faith and fair dealing; Connecticut General Statutes Sec. 31-290a[2]; 42 U.S.C. § 1981 of the Civil Rights Acts of 1866; and 31 U.S.C. § 3730(h) of the False Claims Act. Plaintiff also alleges against Praxair race and gender harassment and retaliation in violation of CFEPA, Title VII, and 42 U.S.C. § 1981. Remaining against the individual defendants are plaintiff's claims for: violation of Connecticut General Statutes Sec. 31-51q[3]; discrimination in violation of CFEPA and 42 U.S.C. § 1981; tortious interference with contract; and constructive discharge in violation of Connecticut General Statutes Sec. 31-290a, 42 U.S.C. § 1981, and 31 U.S.C. § 3730(h) of the False Claims Act. She is seeking compensatory and punitive damages. Pending are Praxair's and the individual defendants' motions for summary judgment. For the following reasons, those motions are granted.

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[2] Conn. Gen Stat. 31-290a prohibits discrimination for exercising rights under the Connecticut Workers' Compensation statutes.

[3] Conn. Gen. Stat. § 31-51q generally prohibits retaliation for employees' exercise of free speech rights.

## I. Background[4]

Miller is a black female who was employed as in-house counsel at Praxair's Danbury office from September 1990 through September 2002. In September 2002, Miller resigned her position with the company. The parties agree that Miller performed "at least to expectations" throughout her tenure at Praxair, and that she received substantial pay increases and bonuses during the last years of her employment with the company. In general, Miller claims that a series of incidents beginning in 2000 resulted in her forced resignation in 2002. Those incidents follow.

### The Diversity Initiative

On or about January 2000, Praxair instituted a Diversity Initiative with the express purpose of increasing the number of African-American males working at the company. Miller came to believe that there were deliberate efforts to thwart the initiative by "terminat[ing] African Americans as quickly as they were hired."

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[4] The following facts are taken from the parties' Local Rule 56(a) statements, summary judgment briefs, and other evidence submitted by the parties. They are undisputed unless otherwise indicated.

Managing Attorney

In or about March 2000, Miller was made Managing Attorney for Praxair's legal department.[5] In this capacity, she spent about five percent of her time on management responsibilities, and split the remainder of her time between general liability cases and employment cases. In her employment work, she reported to defendant, John Day. In her general liability work, she reported to Richard Tisch, who is not a defendant here.

The Severance Pay Plan

In October 2000, at then General Counsel Chaifetz's suggestion, Miller wrote a proposal to modify Praxair's Severance Pay Plan. The Severance Pay Plan had been designed and drafted by Day. Miller claims that Day did not want to change the plan. On November 19, 2000, when Day found out that Miller had written and submitted the proposal to Chaifetz without Day's input or supervision, he wrote her an email. A portion of that email read as follows:

> I am fine with your working directly with Dave [Chaifetz], and vigorously debating or taking issue - within the Department - with my/our positions. However you need to clearly understand - and accept - several expectations I have, none of which were met here:
> - I will be kept at least topically abreast of all significant labor work and projects

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[5] "Managing Attorney" of the law department included budgeting responsibilities and oversight of the non-lawyer staff.

- I will review in advance any policy proposals [or response to client proposals] or major initiatives before communication either to Dave or outside the Department
- you will not work with clients to oppose Department positions with which you disagree; you will address those issues first with me, and, if unsatisfied with the outcome, with Dave. For our clients' purposes we should speak with one voice

Miller alleges that this email was meant to prohibit her from "communicating with Chaifetz or outside the legal department on any policy proposals or major initiatives, a comprehensive and overly broad statement that could encompass almost any matters relevant to the workplace, including diversity, human resources, or even complaints of discrimination."

Meeting with CEO Reilly

On October 27, 2000, Miller became "convinced that higher level managers, including John Day, Del Shannon and others were intent upon terminating a recently hired black female, Stephanie Benjamin-Coleman." On October 29, she met with CEO Dennis Reilly to "talk about her beliefs regarding the failure of the Diversity Initiative, the regression in hires of higher level African-Americans and in particular, her belief that Benjamin-Coleman was targeted for discriminatory discharge."

Miller later learned that on October 30, 2000, Reilly contacted Chaifetz to inform him of his conversation with her, and that Reilly instructed Chaifetz to "ensure that our people are balanced."

On November 3, 2000, Miller told Chaifetz about her conversation with Reilly. Miller claims that Chaifetz told Miller that "most senior managers were opposed to the Diversity Initiative but were going along with in order to be politically correct."

Threat to Outsource General Liability Work

On November 10, 2000, in a law department budget meeting, Chaifetz presented what he called a "radical idea," and which Miller perceived as a threat, to outsource the general liability litigation work. Praxair's general liability litigation work was performed half-time by Miller and full-time by one other attorney. It is undisputed that Praxair never outsourced this work.

Computer "Hacking"

Miller alleges the defendants "hacked into" her computer. The facts of this allegation are hazy, but Miller claims that after opening an email from John Day, she noticed an icon on her computer screen that allowed her to read the emails of a former Praxair employee, Stephanie Benjamin-Coleman. Miller suspects that one or more of the defendants may have taken action that would allow others to read her emails as well. In response to the Miller's inquiries at the time she noticed the icon, the IT department followed-up and provided an alternative explanation for the icon and Miller's being able to read Benjamin-Coleman's emails.

Performance Evaluation

In early 2002, Miller received a written performance evaluation for 2001. It was the first time Praxair had conducted such an evaluation in six or seven years. Associate General Counsel William McClure drafted the evaluation. John Day completed the final evaluation, and did not ask for input from Richard Tisch, Miller's supervisor on general litigation matters. Day maintained McClure's rating of Miller as "meets expectations," but altered some of the evaluation's narrative language. The McClure draft read as follows:

> Ms. Miller provides legally sound advice to her clients in a professional manner that is well received. She is customer focused and is careful to explain options to her clients in terms that can be understood by a layperson. She is very supportive of human resource managers, and in particular newer and less-experienced HRMs. While most clients find that she responds promptly to their inquiries, a few mentioned that on occasion she is unavailable and does not respond promptly. Many of those objections could be avoided if Ms. Miller were to leave notice of her absences on her voicemail and via the Lotus Notes "Out of the Office" Feature. Ms. Miller's skills in negotiating settlements are also praised; as was her ability to 'wear three hats' (labor, third party liability, safety) in addressing accident litigation involving third parties. As part of her development, the PDI group would like Ms. Miller to participate in one of the PDI HR semi-annual management meetings.

Day's final evaluation read as follows:

> Even though she sometimes has to deliver disappointing news, Jo [Miller] provides legally sound advice to her clients in a professional manner that is generally well received; with a few HR clients some mutual bridge-building may be helpful. She is careful to explain options to her clients in terms that can be understood by a layperson. Jo's skills in negotiating settlements are particularly notable, as is her ability to 'wear three hats' (labor, third party liability, safety) in addressing accident litigation involving third parties. Jo may be able to better address the occasional perception that she does not promptly respond to some inquiries by ensuring appropriate messages are available in voice mail and Notes. Due to the elimination of the administrative manager position in the Department, Jo had to play a perhaps larger role in the day-to-day affairs of the Department, a largely thankless role she has discharged competently. While there have been some complaints by non-exempts, that is to be expected, particularly given this population.

Although Miller does not dispute the "meets expectations" rating was appropriate, she concluded that the claims in Day's modified evaluation were "deliberate falsifications and were intended to set the stage for further retaliatory action against her." She wrote a three page response to the evaluation in which she accused Day of changing his tone towards her in the evaluation because, in recent times, she had become "a more vocal opponent of the company's recalcitrance on the diversity initiative." In a footnote

of her memo, Miller also wrote: "I think that the answer lies in the fact that these gentlemen are all cronies of yours who seem to have a propensity to attack black female employees."

Miller received a salary increase, grant of stock options, and bonus payment following the 2002 evaluation.

Following Miller's departure from Praxair, the company hired an outside law firm to conduct an internal investigation.[6] The investigation resulted in Day's receipt of negative comments in his 2002 performance appraisal and a letter of discipline in connection with his action regarding Miller's performance evaluation.

Conversation with Del Shannon

In the course of inquiring about her 2002 performance evaluation, Miller claims that she was informed by Human Resources Director Del Shannon that he had lost respect for her for the following reasons: the position she had taken in representing an Asian American female employee; that her judgment was affected whenever minority employees were involved; that Miller interjected herself too much in matters involving minority employees; and that her past employment at the NLRB tainted her judgment and she sided too much with the NLRB on labor issues.

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[6] The details of the investigation are not part of the record before the Court because they are protected by Praxair's attorney-client privilege.

John Day's Comments

Miller alleges that she was told by John Day on three to four occasions from the summer of 2000 to the summer of 2001 that "we just shot another black male" in reference to Praxair's firing of black male employees. She also alleges that John Day told Miller that she should not "think like a minority."

Oakland NLRB Issue

In the spring of 2002, Miller was responsible for handling Praxair's legal response to the National Labor Relations Board ("NLRB") on an issue involving a Praxair employee in Oakland. She alleges that she learned that Sam Castillo, a member of the human resources department, deliberately gave her false and misleading information that she relied upon in writing a letter to the NLRB. She also alleges that various individuals working at Praxair thwarted her efforts to remedy the statements or investigate the conduct of Castillo or any other parties responsible.

Workers' Compensation Retaliation

In the summer of 2002, Miller met with General Counsel Chaifetz to note "her concerns regarding possible retaliation that she believed had already taken place against [law department employee Christine Mommens] for engaging in protected activity" under the Workers' Compensation statutes. Miller alleges that Chaifetz instructed her that if Mommens filed a workers' compensation claim, Miller should fire her. Mommens has attested that she never complained about safety issues at Praxair, and Praxair also denies these events.

Resignation

On August 22, 2002, Miller resigned her employment with Praxair, effective September 13, 2002. General Counsel Bill McClure's reaction was to ask her if there was anything the company could do to get her to stay.

In September 2002, the Vice President of Human Resources, Sally Savoia, offered Miller the opportunity to speak internally with the General Counsel and/or the CEO regarding any concerns she might have and the reasons that she wanted to resign. Miller declined. Savoia also offered to have the Miller speak with a representative of Wright Associates, a human resources consultant, reasoning that Miller might be more comfortable talking to the consultant about her reasons for leaving Praxair than she would be talking to Praxair employees. Miller also declined this offer.

Miller then filed charges with the Connecticut Commission on Human Rights and Opportunities and the Equal Employment Opportunity Commission. The Equal Employment Opportunity Commission issued a Notice of Right to Sue letter which was received on or about February 23, 2005. The Connecticut Commission on Human Rights and Opportunities issued a Release of Jurisdiction on or about March 2, 2005.

Miller brings suit in this Court on a ten-count complaint.[7] In summary, she alleges that she resigned

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[7] The operative pleading is the Third Amended Complaint, filed December 19, 2005. On September 18, 2006, the Court issued the following order dismissing some counts

from employment at Praxair as a result of the intolerable working conditions occasioned by defendants' harassment of and retaliation against her, and therefore that she was constructively discharged.

## II. Summary Judgment Standard

In a summary judgment motion, the burden is on the moving party to establish that there are no genuine issues of material fact in dispute and that it is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56; Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986). A court must grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986) (quoting Fed. R. Civ. P. 56(c));

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ORDER . . . As to the motion to dismiss, Counts 1 and 3 are dismissed, absent objection, as to the individual defendants That portion of Count 2 that invokes Conn Gen Stat Section 46a-58(a) is granted, absent objection, as to all defendants. That portion of Count 2 that invokes Conn. Gen. Stat. 46a-60(a)(1) is dismissed as to the individual defendants, absent objection. Count 8 is dismissed in its entirety, absent objection. The balance of the motion to dismiss is denied, but without prejudice to filing a motion for summary judgment.

Although the complaint is at times unclear, the Court has attempted in this Ruling to match each count with the defendant or defendants to which it was intended to apply Absolute precision on this point, however, is unnecessary because the Court finds that all of the counts have as elements constructive discharge, an adverse employment action, or hostile work environment, and Miller has not presented evidence as to any of those elements that is sufficient to survive summary judgment.

accord Miner v. Glen Falls, 999 F.2d 655, 661 (2d Cir. 1993). A dispute regarding a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson, 477 U.S. at 248.

Because this is a discrimination case where intent and state of mind are in dispute, summary judgment is ordinarily inappropriate. Carlton v. Mystic Transp., 202 F.3d 129 (2d Cir. 2000). "The summary judgment rule would be rendered sterile, however, if the mere incantation of intent or state of mind would operate as a talisman to defeat an otherwise valid motion." Meiri v. Dacon, 759 F.2d 989, 998 (2d. Cir. 1985). A plaintiff may not rely on conclusory statements or mere contentions that the evidence in support of summary judgment is not credible. Ying Jing Gan v. City of New York, 996 F.2d 522, 532 (2d Cir. 1993); Henry v. Daytop Village, Inc., 42 F.3d 89, 97 (2d Cir. 1997) ("The plaintiff must adduce evidence consisting of more than mere conclusory or unsubstantiated statements."). Similarly, a plaintiff, as the nonmovant, may not rest "upon the mere allegations or denials" in its complaint to demonstrate the existence of a genuine issue of material fact. Fed. R. Civ. P. 56(e). Therefore, after discovery, if the nonmoving party "has failed to make a sufficient showing on an essential element of [its] case with respect to which [it] has the burden of proof," then summary judgment is appropriate. Celotex, 477 U.S. at 323.

## III. Discussion

Praixair and the individual defendants move for summary judgment on all surviving counts. They argue that because all of these counts require proof of

constructive discharge and an adverse employment action, which the Miller cannot establish, she cannot prevail. They also attack the individual counts of the complaint on other grounds.

Counts Four, Five, Six, Seven, and Ten are causes of action that rely on Miller's allegation of constructive discharge. Count One (Conn. Gen. Stat. § 31-51q), Count Two (CFEPA), Count Three (Title VII), and Count Nine (42 U.S.C. § 1981) depend, if not on constructive discharge, on Miller's allegations of retaliation or harassment, and therefore she must present evidence of an adverse employment action or hostile work environment. See, e.g., Conn. Gen. Stat. § 31-51q (requiring discipline or discharge of employee on account of employee's exercise of certain constitutional rights); Kessler v. Westchester County Dep't of Soc. Servs., 461 F.3d 199, 205-06 (2d Cir. 2006) (requiring adverse employment action for Title VII retaliation claim); Crocco v. Advance Stores Co. Inc., 421 F. Supp. 2d 485 (D. Conn. 2006) (explaining Title VII and CFEPA hostile work environment standard). Because Miller has not presented evidence upon which a reasonable jury could find constructive discharge, an adverse employment action, or hostile work environment, summary judgment is granted as to all of her claims.

A. Constructive Discharge

The standard for constructive discharge is demanding. A constructive discharge occurs when "the employer, rather than acting directly, deliberately makes an employee's working conditions so intolerable that the employee is forced into an involuntary resignation." Pena v. Brattleboro Retreat, 702 F.2d

322, 325 (2d Cir. 1983) (internal quotations and citations omitted). "Case law generally focuses on two parts of this standard: the employer's intentional conduct and the intolerable level of the work conditions." Petrosino v. Bell Atlantic, 385 F.3d 210, 229 (2d Cir. 2004). The standard for constructive discharge is not merely whether the employee's working conditions were difficult or unpleasant. Stetson v. Nynex Service Co., 995 F.2d 355, 360 (2d Cir. 1993). Rather, "a claim of constructive discharge must be dismissed as a matter of law unless the evidence is sufficient to permit a rational trier of fact to infer that the employer deliberately created working conditions that were so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign." Id. at 361 (internal citations and quotations omitted). A constructive discharge claim must entail something more than what is required for an ordinary sexual harassment or hostile-environment claim. See Pennsylvania State Police v. Suders, 542 U.S. 129, 154 (2004); Mack v. Otis Elevator Co., 326 F.3d 116, 128 (2d Cir. 2003) (finding that facts supported hostile work environment claim but did not support a constructive discharge claim).

Since "the standard for constructive discharge requires an evaluation of how a reasonable employee would behave 'in the employee's shoes,' the issue should generally be left to the trier of fact." Halbrook v. Reichhold Chemicals, Inc., 735 F. Supp. 121, 125 (S.D.N.Y. 1990) (quoting Pena, 702 F.2d at 325). However, the "reasonable person" standard is an objective standard that "does not depend on such traditionally triable issues as the subjective reaction of any particular employee to changed working

conditions." Id. at 126. "A claim of constructive discharge cannot survive a motion for summary judgment based only on the employee's subjective beliefs about his working conditions. Instead, the employee must present some objective evidence of intolerable working conditions." Zephyr v. Ortho McNeil Pharmaceutical, 62 F. Supp. 2d 599, 608 (D. Conn. 1999). Even if certain factors, standing alone, are "legally insufficient to support constructive discharge," the various conditions should not be treated as "separate and distinct rather than additive," since "a reasonable person encounters life's circumstances cumulatively and not individually." Chertkova v. Conn. Gen. Life Ins. Co., 92 F.3d 81, 90 (2d Cir. 1996).

Miller points to several instances to support her claim of intolerable working conditions. First, she cites the defendants' refusal to investigate her claims regarding the Oakland NLRB case and Sal Castillo. Second, she argues defendants' instruction to terminate an employee in violation of the Workers Compensation Act presented her with yet another ethical dilemma that posed intolerable working conditions. Finally, relying on her complaint about race discrimination and retaliation in her memorandum to John Day regarding her 2001 performance evaluation, Miller claims the defendants refused to investigate her claim of race discrimination and retaliation.

Miller has not made out a prima facie case of constructive discharge because she has failed to present sufficient objective evidence to present a genuine issue of material fact that she was deliberately subjected to intolerable working

conditions. Miller presents only her own speculation for a jury to infer that John Day or Del Shannon, let alone any other Praxair employee, deliberately placed her in difficult ethical situations with the intent that she resign. Of more consequence in this motion for summary judgment, however, is that Miller has not presented sufficient evidence that a reasonable person in her shoes would have felt compelled to resign. Again, Miller provides only her own speculation, not the objective evidence necessary for constructive discharge, that the Oakland NLRB and Christine Mommens issues were comprising ethical situations. Additionally, no rational jury could find that Praxair's lack of investigation in response to Miller's complaint of discrimination to John Day – in which she accused Day of having a "propensity to attack black female employees" – made her working conditions intolerable, particularly when Miller herself took no formal steps to report discrimination or initiate an investigation. While these events, taken separately or together, may have made Miller subjectively feel that her working conditions were extremely unpleasant, a reasonable person in her shoes would not have found the working conditions so intolerable that she would have felt compelled to resign.

B. Adverse Employment Action

The Supreme Court recently wrote of adverse employment actions in the context of Title VII: "We speak of material adversity because we believe it is important to separate significant from trivial harms. Title VII, we have said, does not set forth 'a general civility code for the American workplace.'" Burlington Northern and Santa Fe Ry. Co. v. White, 548 U.S. 53, 68 (2006). "An adverse employment action is one which

is more disruptive than a mere inconvenience or an alteration of job responsibilities." Feingold v. New York, 366 F.3d 138, 152 (2d Cir. 2004) (internal quotations and citations omitted)). "Examples of materially adverse employment actions include termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices unique to a particular situation." Id. (internal quotations and citations omitted).

Setting aside her allegation of constructive discharge, Miller alleges none of the prototypical examples of adverse employment actions, such as termination, demotion, decrease in salary, change of job title, loss of benefits, or reduced responsibilities. Additionally, none of the incidents Miller forwards can be considered, as a matter of law, adverse employment actions.

First, Miller alleges an adverse employment action in CEO Reilly's "threat" to outsource general liability litigation work. This "threat," without more, is not an adverse employment action. It is undisputed that no general liability work was ever outsourced, or that Reilly followed up on his comment in any way. Therefore, even taking Miller's allegation as true that Reilly's comment was a threat, if falls into the category of trivial workplace annoyances that do not qualify as adverse employment actions.

Second, Miller alleges that Day's response to her Severance Pay Plan proposal – specifically that she needed to clear things with him and that the department should speak with one voice – was an

adverse employment action. However, as her supervisor on labor and employment issues, it was not an adverse employment action that Day require Miller to clear department-related matters through him. See, e.g., Gomez v. Laidlaw Transit, Inc., 455 F. Supp. 2d 81, 90 (D. Conn. 2006) (holding that defendant's "criticizing her work, standing over her, not letting her leave, or leaving her a stack of papers, or her comment about being sick and tired of plaintiff's being sick," were not adverse employment actions). Additionally, while Miller perceived this as a ban on her commenting outside the legal department on any matters related to the workplace, no rational jury presented with Day's email could find that it applied to anything other than labor department work. As a matter of law, it is not an adverse employment action for Miller's labor and employment supervisor to demand oversight over her labor and employment work.

Next, Miller asserts that Day's altering of her 2001 performance appraisal was an adverse employment action. More specifically, taking Miller's allegations as true, Day altered McClure's draft performance evaluation to make it more negative and even intentionally fallacious. Once again, however, the performance evaluation had no negative employment consequences. In fact, Miller does not dispute that she deserved the "meets expectations" rating she received. Following the evaluation, Miller received a salary increase, grant of stock options, and bonus payment. Therefore, Day's giving Miller a negative evaluation that had no tangible consequences was not an adverse employment action. See, e.g., Gaynor v. Martin, 77 F. Supp. 2d 272, 277, 279 (D. Conn. 1999) (Goettel, J.) ("[C]laims that he received intentional and fallacious

written warnings and critical evaluations as part of the Commission's agency-wide policy of discrimination and retaliation" did not "meet this requirement of a materially adverse employment action.").

Finally, Miller alleges that the defendants' hacking into her computer was an adverse employment action. Miller, however, has not presented any evidence other than her own speculation that her computer was actually "hacked" into. Further, she makes no allegation as to how this surveillance, if it did occur, was a materially adverse employment action. Without even an allegation as to how this was disruptive to Miller's work, it cannot be an adverse employment action.

C. Hostile Work Environment

"When the workplace is permeated with 'discriminatory intimidation, ridicule, and insult,' . . . that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment,' . . . Title VII is violated." Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993) (citations omitted); see Mack, 326 F.3d at 122 (2d Cir. 2003). In evaluating the severity or pervasiveness of the allegedly discriminatory workplace conduct, a court must look at all of the circumstances. See Harris, 510 U.S. at 23. A non-exclusive list of factors that courts consider in making such a determination includes "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." Id. Title VII is not "a general civility code," Oncale v.

Sundowner Offshore Servs., Inc., 523 U.S. 75, 81 (1998), and "[s]imple teasing, offhand comments, or isolated incidents of offensive conduct (unless extremely serious) will not support a claim of discriminatory harassment." Petrosino v. Bell Atlantic, 385 F.3d 210, 223 (2d Cir. 2004).

As to the frequency, "[t]here is no fixed number of incidents that a plaintiff must endure in order to establish a hostile work environment." Alfano v. Costello, 294 F.3d 365, 379 (2d Cir. 2002). The alleged incidents "must be more than episodic; they must be sufficiently continuous and concerted in order to be pervasive." Carrero v. New York City Housing Auth., 890 F.2d 569, 577 (2d Cir.1989); Kotcher v. Rosa and Sullivan Appliance Ctr., Inc., 957 F.2d 59, 62 (2d Cir. 1992) ("The incidents must be repeated and continuous; isolated acts or occasional episodes will not merit relief.").

The standard for evaluating a hostile work environment claim is both subjective and objective: the victim must subjectively perceive the environment to be abusive so that it actually alters the conditions of the victim's employment, and the conduct must also be so pervasive or severe that a reasonable person would find the environment abusive. Torres v. Pisano, 116 F.3d 625, 632 (2d Cir. 1997). Here, Miller has failed to establish a genuine issue of material fact as to whether the conduct was so severe or pervasive that a reasonable person would find the environment abusive.

Miller asserts several incidents that the Court previously discussed in the context of constructive discharge and "adverse employment action" that she

claims contributed to the hostile work environment at Praxair, including: Reilly's threatening Miller with outsourcing of her work; the alleged hacking into her computer; Day's warning her not to communicate outside the department without his approval; Day's issuing her a negative performance appraisal; and Miller's being placed in compromising ethical situations with regard to the Oakland NLRB and Christine Mommens. None of these incidents, however, fall in to the category of "discriminatory intimidation, ridicule, and insult," Harris, 510 U.S. at 21, that form the basis of a hostile work environment claim. Instead, all of the instances that Miller raises are essentially complaints about how she was managed as an employee, and Miller has presented no evidence that they had any undertone of racial discrimination.

Miller additionally forwards as evidence of a hostile work environment John Day's comments about "shooting black males" and telling her "not to think like a minority," and Del Shannon's telling her that she was interjecting herself too much into matters involving minorities. Miller alleges she became aware of "animus" towards her when she investigated the reasons behind Day's comments in her 2001 performance evaluation. Specifically, she details how she approached Del Shannon, the human resources manager, "to determine what, if any, concerns he might have regarding her performance or his relationship with her." It was in this meeting that Del Shannon told Miller, in response to her inquiry, that "her judgment was affected whenever a minority employee was involved"; that she had interjected herself in too many matters involving minority employees; and that his respect for her decreased as a result of an occasion when Miller had assisted an

Asian American female with a complaint of discrimination. Miller also points to John Day's statements on three to four occasions from the summer of 2000 to the summer of 2001 that "we just shot another black male" in reference to having just fired another black male, and statement that Miller should "not think like a minority." She argues that these comments, "especially knowing of Defendants' hostility toward diversity, towards the hiring of black males, and to Plaintiff's involvement in minority matters," would lead any reasonable person to the conclusion that Praxair was a "racially hostile work environment for all blacks."

In response, the defendants first argue that Del Shannon's and John Day's comments were not racially motivated. Del Shannon argues he was simply responding to Miller's inquiry about his perception of her performance. Likewise, Day explains that his comments about "shooting" people when they were fired were directed not only to black employees, but other employees as well, and were not racially motivated. Shannon and Day's motivation, however, is a question of fact.

More convincingly, the defendants argue that even taking Miller's interpretation of the comments as true, they were not severe or pervasive enough to alter the conditions of the her employment and create an abusive working environment. The comments Miller complains of–three to four of the same comment by Day over a year-long period, and a few comments in the context of one conversation with Shannon–are "a few isolated incidents of racial enmity," or "[c]asual comments, or accidental or sporadic conversation," that the Second Circuit had held do not constitute

hostile work environment. See Snell v. Suffolk County, 782 F.2d 1094, 1102 (2d Cir. 1986). A reasonable person would not find these comments severe or pervasive enough to find the work environment abusive. Moreover, Miller's own contention that her job performance never worsened as a result of the allegedly hostile environment is evidence that she did not even subjectively find the environment abusive. See Stepheny v. Brooklyn Hebrew School for Special Children, 356 F. Supp. 2d 248, 264 (E.D.N.Y. 2005) ("Plaintiffs' claims of a hostile work environment fail for an altogether different and independent reason. They have proffered no evidence that the alleged harassment 'interfered with ... [their] job performance, a sine qua non of such a claim,' notwithstanding that certain of Ms. Black's comments may have been offensive.") (citations omitted). Therefore, Miller has not presented a genuine issue of material fact as to hostile work environment.

In summary, while there may have been animus between Miller and one or more Praxair employees that caused Miller's working at Praxair to be unpleasant, she has not presented a genuine issue of material fact as to constructive discharge, an adverse employment action, or hostile work environment, which are essential to her claims.

D. Individual Counts of the Complaint

The Court will also address several of the individual counts of the complaint. Miller alleges in Count One violation of Conn. Gen. Stat. § 31-51q, which prohibits an employer from "subject[ing] any employee to discipline or discharge on account of the exercise by such employee of rights guaranteed by the

first amendment to the United States Constitution or section 3, 4 or 14 of article first of the Constitution of the state." Miller's claim under Conn. Gen. Stat. § 31-51q fails because she cannot establish she was subject to discipline or discharge, as explained above, and because the speech that serves as the basis of her cause of action was made only internally within Praxair. See, e.g., Emerick v. Kuhn, 737 A.2d 456, 469 (Conn. App. Ct. 1999) ("Because the plaintiff's allegations concern the expression of his opinions as to perceived wrongdoing on the part of upper management [], it is a matter between him and his employer and, thus, is not protected speech.").

Miller's claims for wrongful discharge in violation of public policy and breach of implied contract and covenant of good faith and fair dealing in Counts Four and Five also fail because other statutory remedies exist through which Miller can seek relief. See Canty v. Rudy's Limousine, 2005 WL 2297410, at * 4 (D. Conn. September 15, 2005) ("However, where the employee has another available statutory remedy for the complained-of violation, he may not also bring an action for breach of the implied covenant of good faith and fair dealing."); Rose v. James River Paper Co., 2 F. Supp. 2d 245, 255 (D. Conn. 1998) ("A plaintiff bringing a claim for violation of the implied covenant of good faith and fair dealing must also establish that he does not otherwise have an adequate means of vindicating that public policy."); Tracy v. New Milford Bd. of Educ., 2005 WL 1762439, at *1 (Conn. Super. Ct. July 1, 2005) ("It is well established that the public policy exception to the general rule baring wrongful discharge claims by at-will employees is not available if the employee has an adequate statutory remedy.")

(citing Burnham v. Karl & Gelb, P.C., 252 Conn. 153, 159-61 (2000)).

In Count Six, Miller's allegations of tortious interference with contract fail because the individual defendants cannot be held liable for tortious interference with their employer's contract. See Boulevard Associates v. Sovereign Hotels, Inc., 72 F.3d 1029, 1035 (2d Cir. 1995) ("[T]here can be no tortious interference of contract by someone who is directly or indirectly a party to the contract.") (internal quotation marks omitted); Kelly v. City of Meriden, 120 F. Supp. 2d 191, 199 (D. Conn. 2000) ("[A]n agent acting legitimately within the scope of his authority cannot be held liable for interfering with or inducing his principal to breach a contract between his principal and a third party, because to hold him liable would be, in effect, to hold the corporation liable for breaching its own contract.") (internal quotation marks omitted). Thus, to survive summary judgment as to this claim, Miller "must allege and produce evidence that the agent used his power for personal gain." While Miller summarily alleges in her complaint that Reilly, Chaifetz, and Day used corporate power for their own personal gain, she provides no specific allegations as to how they did so, and has adduced no evidence of how they were motivated by personal gain.

Miller alleges in Count Seven violations of Conn. Gen. Stat. § 31-290a(a), which provides that an employer shall not "discharge, or cause to be discharged, or in any manner discriminate against any employee because the employee has filed a claim for workers' compensation benefits or otherwise exercised the rights afforded" to him under the workers' compensation laws. The statute "prohibits an employer

from discharging or otherwise discriminating against an employee because the employee had filed a claim for workers' compensation benefits or otherwise exercised her rights under the act." Mele v. City of Hartford, 270 Conn. 751, 767 (2004). Because it is undisputed that Miller did not file a claim for workers' compensations benefits, her claim under Conn. Gen. Stat § 31-290a fails.

Finally, in Count Ten, Miller alleges violations of the False Claims Act, which provides relief for "[a]ny employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section." 31 U.S.C. § 3730(h). Miller's claim under this section fails because she cannot establish that she engaged in activities in furtherance of a legal action under the False Claims Act as she never filed a claim under the False Claims Act and was never involved in any investigation in furtherance of any claim filed under the False Claims Act.

## IV. Conclusion

For the reasons set forth above, the defendants' motions for summary judgment [Dkts. # 271 & 273] are GRANTED. The defendants' counterclaims are dismissed without prejudice.

SO ORDERED this 18th day of June 2009, at Hartford, Connecticut.

/s/Christopher F. Droney
CHRISTOPHER F. DRONEY
UNITED STATES DISTRICT JUDGE

No. 10-1299

Supreme Court, U.S.
FILED
MAY 24 2011
OFFICE OF THE CLERK

In The

# Supreme Court of the United States

JOSEPHINE S. MILLER,

*Petitioner,*

v.

PRAXAIR, INC., et al.,

*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit**

## OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

To establish constructive discharge under Title VII, is a plaintiff required to show that the employer had the intent to cause the plaintiff to resign?

## PARTIES TO THE PROCEEDING

The Petitioner is Josephine S. Miller. The four Respondents are Praxair, Inc., John Day, David Chaifetz, and Dennis Reilley.

Petitioner was the plaintiff in the District Court, and Respondents were the defendants. In the Court of Appeals, Miller was the appellant and Respondents were the appellees.

## CORPORATE DISCLOSURE STATEMENT OF RESPONDENT PRAXAIR, INC.

Pursuant to Supreme Court Rule 29.6, Respondent Praxair, Inc. hereby states that it has no parent corporation, and there is no publicly held corporation that owns 10% or more of its stock. The other Respondents are individuals for whom there is no parent corporation or stock holdings.

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## I. INTRODUCTION

This case does not merit the exercise of this Court's *certiorari* jurisdiction because the issue presented for review here was not dispositive and never even raised by Petitioner in the proceedings below. There was no need for either of the courts below to determine whether Petitioner had to prove that Respondents intentionally made her working conditions so intolerable that she would resign because they concluded that, as a matter of law, the conditions of Petitioner's employment were not intolerable, findings that Petitioner does not contest here. Nor is it clear that there even is a conflict between the Second Circuit and this Court's precedent regarding the sole issue Petitioner presents for review. Accordingly, the Petition should be denied.

In granting summary judgment, the district court (Droney, J.) held that Petitioner's claims failed "[b]ecause Miller has not presented evidence upon which a reasonable jury could find constructive discharge, an adverse employment action, or hostile work environment. . . ." Pet. App. 21a. As to constructive discharge, Judge Droney explained that "[o]f more consequence in this motion for summary judgment, however, is that Miller has not presented sufficient evidence that a reasonable person in her shoes would have felt compelled to resign." Pet. App. 24a. The issue of "intent" to cause her to resign thus was not the reason why her claims failed; that issue was not dispositive precisely because Petitioner failed even to show the predicate of intolerable working conditions.

The Second Circuit Court of Appeals, through Justices Amalya L. Kearse, Joseph M. McLaughlin, and Debra Ann Livingston, summarily affirmed (six days after oral argument) Judge Droney's carefully reasoned summary judgment ruling, finding that the facts viewed most favorably to Petitioner failed to establish "the sort of 'intolerable' working conditions necessary to a constructive discharge claim." Pet. App. 4a. Again, the question of "intent" was not an issue that the Court of Appeals ever had to reach and was never raised by Petitioner.

Not surprisingly, because Petitioner failed to show that her working conditions were "intolerable," whether Praxair allegedly "intended" to force her to resign by making her working conditions intolerable is simply beside the point. The principal case Petitioner relies upon here, *Pennsylvania State Police v. Suders*, 542 U.S. 129 (2004) ("*Suders*"), cited so often in the Petition that in its Table of Authorities those references are listed as "*Passim*" (Pet. viii), was not cited at all in Petitioner's opening and reply briefs to the Second Circuit. Indeed, it was cited only once in her opposition to summary judgment in the District Court – *not* for the proposition advanced here, but instead in support of the very proposition upon which both lower courts approved summary judgment: "The inquiry is objective: Did working conditions become so intolerable that a reasonable person in the employee's position would have felt compelled to resign?" Joint Appendix, Vol. II-60. In Petitioner's case, both the United States District Court for the District of

Connecticut and the Second Circuit Court of Appeals answered that question in the negative.

Accordingly, even if there were a Circuit split or deviation from this Court's decision in *Suders*, and even if this Court were to rule that intent is not part of the constructive discharge equation, the outcome below would not change at all as a result of such a ruling. These circumstances alone make this case distinctly not worthy of the exercise of *certiorari* jurisdiction. Moreover, it is not even demonstrated that the Second Circuit adheres to any supposed pre-*Suders* "intent" test because, in the post-*Suders* cases Petitioner cites, as well as those she does not, the Second Circuit has not had to reach the "intent" issue to adjudicate a constructive discharge claim; as here, in those cases, the plaintiffs failed to show that their working conditions even met the "intolerable" threshold. Thus, there is no post-*Suders* Second Circuit decision that considers whether the pre-*Suders* law in that Circuit must change. The presumption should be that the Second Circuit follows this Court's decisions, especially when, as here, the ruling appealed from does not state otherwise.

Petitioner's question presented, therefore, is no more than a request for an advisory opinion concerning a legal question that was not presented below, is irrelevant to the disposition of this case, and is not worthy of this Court's jurisdiction. Even if resolved in Petitioner's favor, it would change nothing. For these reasons, the Petition should be denied.

## II. STATEMENT

This Petition arises from a multi-count lawsuit brought by one of Respondent Praxair, Inc.'s former in-house attorneys, Josephine Miller, the Petitioner. The facts are set forth in the District Court's ruling granting summary judgment (Pet. App. 10a-19a), and Respondents incorporate those facts by reference here.

As an initial matter, Petitioner's Statement of the Case misstates the basis upon which summary judgment was granted and affirmed. Contrary to Petitioner's assertions, the absence of "intent" to create conditions so intolerable that Petitioner would be forced to resign demonstrably was not the basis for granting and affirming summary judgment. In its discussion of Petitioner's constructive discharge claim, the District Court concluded that Petitioner had failed to show that her working conditions were so intolerable that a reasonable person in her shoes would have felt compelled to resign. Pet. App. 24a. That finding, fatal to any constructive discharge case, is unchallenged here.

In addition, the District Court found that Petitioner suffered no adverse employment action:

> Setting aside her allegation of constructive discharge, Miller alleges none of the prototypical examples of adverse employment actions, such as termination, demotion, decrease in salary, change of job title, loss of benefits, or reduced responsibilities.

> Additionally, none of the incidents Miller forwards can be considered, as a matter of law, adverse employment actions.

Pet. App. 25a. These findings, too, obviate any need to address the "intent" issue Petitioner attempts to have this Court consider.

Finally, the District Court concluded that Petitioner did not suffer from a hostile work environment:

> Here, Miller has failed to establish a genuine issue of material fact as to whether the conduct was so severe or pervasive that a reasonable person would find the environment abusive.

Pet. App. 28a. The District Court concluded:

> In summary, while there may have been animus between Miller and one or more Praxair employees that caused Miller's working at Praxair to be unpleasant, she has not presented a genuine issue of material fact as to constructive discharge, an adverse employment action, or hostile work environment, which are essential to her claims.

Pet. App. 31a.

Thus, the District Court had no need to decide whether Petitioner's working conditions were somehow "created" with the "intent" that she resign, because the working conditions were not so intolerable as to cause a reasonable person to resign, were not the product of an adverse employment

action, and did not constitute a hostile work environment. *Id.* Intent, therefore, was and remains beside the point.

Likewise, in its non-precedential decision, the Second Circuit summarily affirmed the District Court's findings that the working conditions as a matter of law were not intolerable, that there were no adverse employment actions, and that there was no hostile work environment. Pet. App. 4a-6a. Just as it was unnecessary for the District Court to address *Suders*, "intent," or any purported Circuit conflict, the issue presented here for review was not briefed by the parties or decided on appeal in the Second Circuit.

## III. REASONS FOR DENYING THE PETITION

### A. The Issue Presented Was Not Considered Below

"This Court usually will decline to consider questions presented in a Petition for Certiorari that have not been considered by the lower court." *Patrick v. Burget*, 486 U.S. 94, 99 n. 5 (1988). "[W]e do not decide in the first instance issues not decided below." *National Collegiate Athletic Ass'n v. Smith*, 525 U.S. 459, 470 (1999).

*Suders*, the linchpin case in the Petition, was cited but once below by Petitioner – not for the proposition that she seeks to advance here, but for the non-controversial requirement that before an employee

can claim constructive discharge, she must show that her working conditions were "intolerable." The case was not cited by either Petitioner or Respondents in their appellate briefs. The purported "split in the Circuits" trumpeted in the Petition was not raised by the Petitioner or addressed at any level. Whether *Suders* eliminated an "intent" requirement played no role in the analysis. By advancing the "intent" issue here, Petitioner is attempting to inject an issue into this case, at the final stage of judicial review, which was not considered or addressed below.

### B. Even If *Suders* Eliminated An "Intent" Requirement, The Outcome Of This Case Would Not Change

The single ground upon which Petitioner seeks review is the question of whether "intent" to create intolerable working conditions so as to force an employee to resign is or is not an element of a constructive discharge claim under federal law. However, that is not an issue that this Court ever would reach here because Petitioner does not contest the predicate finding that her working conditions were not intolerable. Stated another way, if the working conditions are not intolerable, it does not matter whether they were created with the intent that the employee resign, so the issue is a red herring designed to distract from the absence of a legal wrong. Certainly, this Court's role is to decide questions of great importance, but it does not do so "abstractly." *The*

*Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959). Here, the issue raised in the Petition was not necessary for the resolutions below, and therefore resolution of the supposed Circuit conflict or the need to address any alleged deviation from *Suders* is irrelevant to the outcome of this case. The dispositive ground upon which the lower courts granted and affirmed summary judgment, the absence of intolerable working conditions, is not contested.

Thus, in order to reach the issue presented for review here, the Court would have to forgive Petitioner for not raising it below and overlook that the courts below did not have to address it because the predicate element of intolerable working conditions was not satisfied. This case is hardly the appropriate vehicle for review when the outcome of this Court's decision, whichever way it goes, will change nothing about the ultimate outcome.

### C. The Second Circuit's Post-*Suders* Decisions Cited By Petitioner, As Well As Those Not Cited, Further Illustrate Why *Certiorari* Should Be Denied

Petitioner cites several post-*Suders* Second Circuit decisions to illustrate the supposed split, as well as the Second Circuit's purported continued adherence to a pre-*Suders* "intent" requirement. Pet. 15. However, upon closer examination of these decisions, they, like the ones at bar, never reached the

"intent" issue. Instead, just like the case at bar, they affirmed judgments for the employer when, as here, the plaintiff could not show that the working conditions met the predicate requirement of intolerability. In fact, it is not even clear whether the Second Circuit would follow Petitioner's interpretation of *Suders* or not, because the cases she cites never had to address the very matter.

Thus, in *Nugent v. Saint Luke's-Roosevelt Hosp. Ctr.*, 303 F. App'x 943, 945 (2d Cir. 2008), the court affirmed the employer's summary judgment on the plaintiff's constructive discharge claim, expressly discounting the need to address the issue of intent:

> However, the District Court's decision did not require a showing of *mens rea*. The District Court considered Nugent's evidence – the reprimands, written warnings, and suspension she received, and the psychological harm she claims she suffered as a result – and concluded that it was insufficient to support a finding that a reasonable person in her situation would have felt compelled to resign. Accordingly, even if she is correct that the Supreme Court [in *Suders*] has removed the intent element of the constructive discharge standard, Nugent introduced insufficient evidence to survive summary judgment.

In *Theilig v. United Tech. Corp.*, No. 10-1417, 2011 U.S. App. LEXIS 6074, at *6-7 (2d Cir. March

24, 2011), the court again did not reach the intent issue because it did not have to do so:

> Theilig argues on appeal, as he did below, that there was no evidence of "intolerable working conditions," because he was no longer at work. Theilig therefore argues in essence that the purported failure to accommodate is tantamount to constructive discharge. Theilig's concession that there were no intolerable working conditions, however, is fatal to his claim under the law of this Circuit.

The final post-*Suders* Second Circuit case cited in the Petition, *Morris v. Schroder Capital Mgmt. Int'l*, 481 F.3d 86, 88 (2d Cir. 2007), similarly never reached the intent issue:

> Even assuming the truth of Morris's factual allegations and giving him the benefit of all reasonable inferences, he has failed to plead that the working conditions at his former place of employment were "so difficult or unpleasant that a reasonable person in [his] shoes would have felt compelled to resign." [Citation omitted].

In addition to these decisions, there are two post-*Suders* Second Circuit decisions Petitioner omits from her lengthy brief. The first, *Holowecki v. Federal Express Corp.*, 382 F. App'x 42 (2d Cir. 2010), quoted verbatim and applied the *Suders* test: "To establish

constructive discharge, a plaintiff 'must show that the abusive working environment became so intolerable that her resignation qualified as a fitting response.'" *Id.* at 46. The court there, as here, concluded that the plaintiff "was unable to point to evidence of intolerable working conditions. . . ." *Id.*

The second case not mentioned in Petitioner's brief, *Petrosino v. Bell Atlantic*, 385 F.3d 210 (2d Cir. 2004), cited *Suders*, which had just been announced, and also applied its holding. See *id.* at 225 ("'a supervisor's official act precipitates the constructive discharge'") and 230 ("'The inquiry is objective: Did working conditions become so intolerable that a reasonable person in the employee's position would have felt compelled to resign?'"). The *Petrosino* court reviewed the evidence and, while concluding that there was no deliberate attempt to force the plaintiff's resignation, it ultimately rejected her predicate claim that working conditions were intolerable: "In any event, Petrosino has not demonstrated that quitting was the only way out. . . ." *Id.* at 231. The court emphasized, "[b]ut where an employee has within her power the means to eliminate the added condition that purportedly renders her employment intolerable and fails to pursue that option, she cannot demonstrate that she was compelled to resign." *Id.* at 231-32.

Accordingly, at least in the Second Circuit, in each of the cases citing *Suders*, the courts have correctly described its holding, quoting from this Court's

## IV. CONCLUSION

The Petition for a Writ of Certiorari should be denied.

May 24, 2011

Respectfully submitted,

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No. 10-1299

In the
# Supreme Court of the United States

JOSEPHINE S. MILLER,
*Petitioner,*

v.

PRAXAIR, INC., ET AL.,
*Respondents.*

*On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit*

## PETITIONER'S REPLY BRIEF

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## REPLY

Unwittingly, Respondents' Opposition actually suggests that granting certiorari on the question presented is warranted and reveals that this case is a particularly appropriate vehicle for resolving the question.

Respondents' main argument is that granting review and eliminating the intent requirement would not change the outcome in this case because there is a separate constructive-discharge requirement of intolerable working conditions. But, as evidenced in the decision below and in decisions Respondents rely on, the Second Circuit's flawed emphasis on employer intent improperly affects its determinations whether the conditions are intolerable. Thus, not only is the intent requirement improper (and the subject of the circuit split), it has tainted the Second Circuit's approach to what should otherwise be an uncontroversial requirement to establishing constructive discharge. This case therefore presents the opportunity to clarify exactly how the constructive-discharge doctrine works—not just as to the intent requirement alone, but also as to the role, if any, such intent (or lack thereof) should play in concluding that the conditions are intolerable as a matter of law.

This Reply proceeds to make four brief rebuttal points: (1) the issue of intent was considered below; (2) the Second Circuit improperly relies on employer intent; (3) that improper reliance affected the outcome in this case; and (4) Miller explicitly argued that her working conditions were intolerable.

Certiorari should be granted.

### 1. The issue of intent was not only considered but emphasized below when assessing whether the conditions were intolerable.

Respondents first contend that the issue of employer intent was not considered below. But the Second Circuit explicitly considered it as part of its analysis of whether Miller could show intolerable conditions—in particular, the court emphasized that Respondents did not intend for her to resign because they asked her to stay at the company. After remarking that the conditions "largely amount" to disagreements that are insufficient to create intolerable conditions, the court relied on the lack of employer intent to fully assess the intolerable conditions and actually bar the claim: "[D]efendants made *repeated* attempts to convince her to stay, and, accordingly, no rational trier of fact could conclude that a reasonable person in her position would have felt that her employer deliberately sought to make her *working conditions so intolerable* that she had no choice but to resign." Pet. App. 5a (second emphasis added).

Respondents also note that the split in the circuits Miller "trumpeted" in the Petition was not argued in the Second Circuit. Opp. at 7. Of course it was not. The Second Circuit is bound to apply its own precedent—briefing the split in the circuits at that stage would simply call for the elementary rebuke that panels of the circuit courts cannot overturn their previous decisions. The reality is that this case comfortably fits within a recognized pattern of decisions that warrant this Court's review: A circuit is out of line with others on a recurring question, that

circuit continues to apply its own rule based on its own precedent, and this Court grants certiorari to resolve the split and decide what is the best rule. (On that last score, note that Respondents never actually defend the intent requirement.)

**2. The Second Circuit (and others) adhere to the intent requirement.**

Despite the Second Circuit's emphasis on lack of employer intent (as shown by Respondents' attempts to convince Miller to stay at the company), Respondents nonetheless say that it is "not clear" whether the Second Circuit still adheres to the intent requirement. For two reasons, Respondents' discussion on this point favors granting certiorari.

First, the Second Circuit heavily relies on employer intent, as shown by the decision here and by decisions Respondents raise. Take *Petrosino v. Bell Atlantic*, 385 F.3d 210 (2d Cir. 2004), for example: Respondents explain that "[t]he *Petrosino* court reviewed the evidence and, *while concluding that there was no deliberate attempt to force the plaintiff's resignation*, it ultimately rejected her predicate claim that working conditions were intolerable." Opp. at 11 (emphasis added). As in Miller's case, the Second Circuit puts great weight on the lack of employer intent, even to assess the intolerable conditions. The *Petrosino* court even emphasized similarities to its pre-*Suders* decision in *Pena v. Brattleboro Retreat*, 702 F.2d 322 (2d Cir. 1983), finding the intent issue to be crucial: "As in this case, there was no evidence that the employer wished the employee to resign her position." *Petrosino*, 385 F.3d at 231. Respondents also do not address Miller's point that district courts in the Second Circuit

continue to follow this approach. *See, e.g.*, Pet. at 16 (citing a recent district-court decision rejecting plaintiff's claim as a matter of law because of evidence that employer "wanted her to stay").

Second, even if we assume that the Second Circuit's position is simply "not clear," certiorari is appropriate precisely to ensure that there is clarity. Respondents do not dispute that the Fourth, Sixth, and Eighth Circuits have also followed a minority view endorsing the intent requirement. District courts are issuing decisions regarding constructive discharge approximately every day in this country. The legal standard should be clear and justified, and this Court has the opportunity to ensure that it is.

On that note, Respondents also wrongly state that this case involves "misapplication of a properly stated rule of law." Opp. at 12 (quoting Sup. Ct. R. 10). The whole point of the Petition is that the intent requirement leads to an improper rule of law—one that comprises an important federal question causing decisions by some circuits (e.g., the Second) to conflict with decisions of other circuits and this Court. *See* Sup. Ct. R. 10(a), (c). The conflict in the circuits is fully developed here, and the Second Circuit's particularly flawed emphasis on employer intent is revealed even by decisions Respondents cite.

### 3. In the Second Circuit, employer intent improperly affects whether the conditions are sufficiently intolerable, so it affects the outcome of this case.

Respondents also mistakenly claim that eliminating the intent requirement would not alter the

Second Circuit's decision in this case. They say that is true because the intent requirement has no effect on the independent question of whether the conditions were intolerable. Perhaps that is how it should be—but that is not how the Second Circuit approaches constructive discharge.

As noted, the Second Circuit improperly relies on the lack of employer intent to make its determination that the conditions are not intolerable as a matter of law. That is exactly what occurred here, when the court emphasized the Respondents' efforts to have Miller remain at the company as part of its conclusion that the conditions were not intolerable as a matter of law. That is also what occurred in *Petrosino*, where the court, following the *Pena* decision, relied on the lack of intent in concluding that the conditions were not intolerable. 385 F.3d at 231. In the Second Circuit's view, if there is no intent to force resignation, that fact weighs heavily when assessing whether the conditions were intolerable. If this Court grants review and concludes that this approach is not proper, the outcome in Miller's case would certainly change.

### 4. Miller explicitly challenged the Second Circuit's conclusion that the conditions at Praxair were not intolerable.

Respondents claim that Miller's Petition does not challenge the conclusion that her working conditions were not so intolerable that a reasonable person would feel compelled to resign. That claim is puzzling, as the Petition explains in detail how consideration of "conditions Miller faced shows that any reasonable person would have felt compelled to resign." Pet. at 20. The Petition then explained how Miller suddenly

became a target after vocalizing concerns about discriminatory conduct and was then subjected to insults that she was "thinking like a minority" and forced into unethical positions as in-house counsel. *Id.* at 21. The Petition also explained that, under a proper rule that did not put such undue weight on employer intent to establish constructive discharge, her claim would survive summary judgment. *Id.*

This case thus presents the opportunity for this Court to explicitly address the employer-intent requirement and to clarify the doctrine of constructive discharge—particularly as to whether such intent should weigh so heavily (as it did here and in other Second Circuit decisions) in assessing whether the conditions were intolerable. Miller's Petition explained why the intent requirement was illogical, and the Respondents have not defended it. This Court should correct those circuits that improperly continue to rely on employer intent.

## CONCLUSION

The Petition should be granted.

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